Supreme Court, U.S.
FILED
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No. 93-812

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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RED CLAY CONSOLIDATED SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,
*Petitioners*,

v.

ALDEN JENKINS, *et al.*,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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December 20, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

1. Whether the decision of the Third Circuit, which remanded this case to the district court for further consideration of issues relevant to the liability determination, is ripe for review by this Court at this time.

2. Whether the Court of Appeals acted properly in remanding this case to the district court for further proceedings on plaintiffs' claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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## RESPONDENTS' BRIEF IN OPPOSITION

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Respondents submit this brief in opposition to the petition for writ of certiorari.

## STATEMENT OF THE CASE

Plaintiff-respondents, black voters in the Red Clay Consolidated School District in Delaware, filed this class action in May 1989 challenging the use of at-large elections to elect the members of the Red Clay School Board. Plaintiffs alleged that at-large voting dilutes black voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Following a trial in April and May, 1991, the district court found that the black population of the school district is sufficiently large and geographically compact that if the district were subdivided, a majority black single-member district could be created. Pet. App. 81a-82a. The court also found that black voters in Red Clay were politically cohesive, usually voting for black candidates in elections in which black candidates ran for office. Pet. App. 82a-91a.

White voters in Red Clay, by contrast, rarely supported black candidates. The district court credited calculations showing that in seven black-vs.-white school board elections since 1981, on average no more than 28% of white voters could have voted for black candidates. Pet. App. 95a-97a, 28a-29a. The defendants did not dispute these calculations.[1]

As a result, prior to the filing of this lawsuit only one black candidate had succeeded in winning election to the Red Clay School Board, winning by a plurality of the vote in an election where he was the only black candidate opposing five white candidates. Pet. App. 71a, 33a, 55a. Running as an incumbent in 1985, this black representative was defeated in a head-to-head race against one white opponent, despite substantial support from black voters. Pet. App. 28a, 71a, 90a. From 1985 through 1990, no black representative sat on the school board. In 1990, after the filing of this lawsuit, a black candidate was elected because, for the first time ever in Red Clay, no white candidate filed for the seat. Pet. App. 79a, 8a-9a. In sum, six of the seven black school board candidates who ran against white opponents were defeated

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[1] The calculations were based on the actual vote totals obtained by black candidates, assuming, for the sake of analysis, that all of the votes they received were cast by white voters—that is, assuming the maximum possible degree of white crossover voting. For a full explanation of these calculations, *see* Pet. App. 27a-29a, 95a-96a.

in elections held in 1981, 1983, 1985, and 1988. Pet. App. 71a-72a.[2] The district court found that there had been some underrepresentation of black citizens on the school board and that the elections of the successful black candidates in 1981 and 1990 may have occurred under unusual circumstances. Pet. App. 81a, 57a.

Despite these findings, the district court held that plaintiffs had failed to prove a Section 2 violation because they failed to demonstrate legally significant white bloc voting as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986). The district court ruled that the white bloc voting demonstrated by plaintiffs' analysis of school board elections was not legally significant because black candidates might be able to win election without obtaining a majority of the white vote. Pet. App. 96a. Such a victory would be possible, for example, if three or more candidates enter a race and the white candidates split the white vote, allowing the black candidates to win with a plurality. *See* Pet. App. 29a. The district court ruled against plaintiffs on this ground although no candidate, black or white, had won a school board election with a plurality of the vote since 1981. Pet. App. 33a.[3]

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[2] In 1991, after the trial of the case but before the district court's decision, another black candidate was elected to a special one-year term to fill a vacancy. The term has expired and the candidate is no longer serving on the school board. Pet. App. 77a, 7a, 9a. The record contains no evidence of the circumstances surrounding the 1991 election, although the Court of Appeals' decision permits the parties to submit evidence on this election on remand. Pet. App. 66a-67a.

[3] The district court also assessed other factors that are "supportive of, but *not essential to*," a showing of a Section 2 violation (the "Senate Report" factors). *Thornburg v. Gingles*, 478 U.S. at 48 n.15 (emphasis in original); *see* S. Rep. No. 97-417, 97th Cong., 2d Sess. at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 206-07. The district court ruled that the Red Clay School Board had been unresponsive to the interests of black citizens in important respects. Pet. App. 111a-113a. The Court also found that there had been a lengthy history of official discrimina-

In a decision issued August 19, 1993, the Third Circuit unanimously reversed and remanded the case for further consideration, holding that the district court erred in ruling that persistent white bloc voting against black candidates was not legally significant under *Gingles* factor III merely because a black candidate might be able to win with a plurality of the vote if more than two candidates run. Reliance on this plurality-win theory, the Court held, conflicts with *Gingles*' requirement of a "searching practical evaluation of the past and present reality," 478 U.S. at 45 (citation and internal quotations omitted), because in Red Clay no candidate has won a school board election with a mere pluralty of the vote for more than ten years. Pet. App. 32a-35a.[4] As the Court stated:

> [T]he district court erred in focusing on the potential for Red Clay's plurality scheme to aid minority-preferred candidates rather than on the practical effects which that scheme actually has had. Since no candidate, black or white, has won with a mere plurality since 1981, and only one black candidate

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tion against black citizens in Delaware and New Castle County, including: the use of poll taxes and a literacy test for voting; *de jure* segregation of schools, universities, public accommodations and housing; and racial discrimination in public employment. Pet. App. 98a-99a. This discrimination was reflected in continuing severe socioeconomic disparities between black and white citizens. Pet. App. 99a. However, the court ruled that this history of racial discrimination and its continuing effects on black citizens were irrelevant because the disparity in voter turnout between blacks and whites was not as great in school board elections as in elections for other offices. Pet. App. 99a-100a. The district court also found against plaintiffs regarding other Senate Report factors such as discrimination in slating practices and the use of racial appeals. Pet. App. 101a-115a.

[4] As of the time of trial, moreover, the only black candidate who had ever attained a majority of the vote in a schoolboard election was a candidate who had no white opponent. She won the 1990 election held after this lawsuit was filed. Pet. App. 9a.

> has run in an election against more than a single opposing candidate since 1981, the court could not have concluded on this record that the plurality scheme had the actual effect of allowing the black voters of Red Clay to elect their representatives of choice even though the white voters consistently voted against the minority-preferred candidates in numbers sufficient to prevent those candidates from winning a majority of the overall vote.

Pet. App. 35a; *see also id.* at 6a, 31a-34a, 65a.

The Third Circuit remanded the case to the district court for further consideration under the correct legal standard. The Court also suggested that, on remand, the district court could receive evidence on the 1991 election that was held after the trial of the case. Pet. App. 65a-67a.

Because of its finding of error with respect to the district court's plurality-win theory, the Court of Appeals found it unnecessary to review plaintiffs' other assignments of error, including additional errors in the district court's evaluation of white bloc voting, Pet. App. 35a-36a, and errors in the district court's treatment of the Senate Report factors. Pet. App. 65a. The Court also ruled that the alternative grounds defendants advanced to uphold the district court's judgment did not obviate the need for a remand in light of the district court's error in applying *Gingles* factor III. Pet. App. 35a-67a.

**REASONS WHY THE PETITION SHOULD BE DENIED**

The Third Circuit's decision is an interlocutory opinion which remanded the case to the district court for further consideration and which suggested that the district court receive additional evidence prior to determining the merits of respondents' claim under Section 2 of the Voting Rights Act. Therefore, this case is not ripe for review by this Court.

Furthermore, the Third Circuit's decision does not raise the questions presented in the petition for certiorari. The district court found that black citizens have not enjoyed persistent proportional representation on the Red Clay School Board, and the Court of Appeals affirmed the district court's factual findings on that point. In addition, the petitioners were given a full opportunity to attempt to establish a non-racial motivation for racially polarized voting patterns in the school district, but the evidence strongly refuted their theory and neither the district court nor the Court of Appeals credited petitioners' factual contentions about this alleged cause for black candidates' defeat. The alleged "conflicts" created by the Third Circuit's decision are based upon faulty factual assertions and misstatements about the Court's decision, including invented quotations which do not appear in the Third Circuit's opinion.

## I. THIS CASE IS NOT RIPE FOR REVIEW BY THIS COURT BECAUSE THE DECISION OF THE COURT OF APPEALS REMANDED THE CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

The Third Circuit has remanded this case to the district court for further proceedings. Pet. App. 66a-67a. The record may be expanded upon remand to the district court, and the additional proceedings could obviate any justification for review. At this time, therefore, the case is not ripe for issuance of a writ of certiorari. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ [of certiorari] is not issued until final decree"); *see generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224-26 (6th ed. 1986). No reason

exists to depart from the general rule against review of interlocutory judgments in this case.

Further, the interlocutory nature of the decision below also requires denial of petitioners' request to "hold" this case pending the disposition of other voting rights cases before this Court. Even if, contrary to fact (*see infra* at n.19), any voting rights case now before the Court raised issues relevant to the disposition of this case, the lower courts will have a full opportunity to address any new decisions in the course of the further proceedings that must be conducted in this case. Thus, because the Court of Appeals' decision is non-final, the denial of certiorari will not deprive petitioners of an opportunity to argue the relevance of any decisions issued by this Court.

## II. THERE EXIST NO SPECIAL OR IMPORTANT REASONS FOR THE ISSUANCE OF A WRIT OF CERTIORARI AS REQUIRED BY RULE 10 OF THE RULES OF THIS COURT.

### A. Both Courts Below Found that Black Citizens Have Been Underrepresented on the School Board, and Further Review of this Factual Issue by this Court Is Unwarranted.

Petitioners incorrectly assert that the Court of Appeals found that black citizens have enjoyed persistent proportional representation on the Red Clay School Board,[5] and that the decision to remand the case to the district court is therefore in conflict with decisions of other courts which have upheld a defense to Section 2 claims based on sustained proportional representation of minority citizens.

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[5] The petitioners misleadingly quote a portion of the Court of Appeals' opinion which *mentioned* the petitioners' arguments concerning proportional representation, Pet. at 8, but fail to quote the next sentence, which states: "The defendants' argument fails, however, in light of the district court's finding on this issue." Pet. App. 55a.

The factual premise of this "conflict" is flatly incorrect. The district court specifically found that there had been "some *under-representation* of black citizens on the Red Clay Board" and that "some of the black candidates' success may have occurred in unusual circumstances." Pet. App. 81a (emphasis added). The Court of Appeals carefully reviewed these findings, including the findings of unusual circumstances in elections where minorities were successful, and stated:

> We conclude that the court's finding in this regard was not clearly erroneous as the record amply supports a finding that the black voters of Red Clay have not achieved persistent proportional representation.

Pet. App. 56a.

In reaching this decision the Court of Appeals followed this Court's opinion in *Thornburg v. Gingles*. *Gingles* held that a history of "persistent proportional representation" of minorities may, depending upon the circumstances, prevent a successful challenge under Section 2. 478 U.S. at 77. However, *Gingles* held that the circumstances surrounding minority electoral success should be examined because the success of one or a small number of minority candidates does not necessarily negate a showing of legally significant white bloc voting. 478 U.S. at 57, 75-76. Indeed, the *Gingles* test for legally significant white bloc voting makes this clear: white bloc voting is legally significant when "the white majority votes sufficiently as a bloc to enable it—*in the absence of special circumstances, such as the minority candidate running unopposed—usually* to defeat the minority's preferred candidate." *Id.* at 51 (emphasis added).

As described above, both the district court and Court of Appeals found that black candidates' success in 1981 and 1990 occurred under unusual circumstances, one candidate winning by a plurality against five white opponents, and the other winning when no white candidate filed for the seat. As the Court of Appeals noted, "the

[district] court found that both the election of Roberts in 1981 and Scotton in 1990 were accompanied by special circumstances and refused, based on those findings, to accord full weight to either election." Pet. App. 57a. The Third Circuit, therefore, did not merely find that black candidates had usually been defeated, but correctly examined the circumstances surrounding the election of those who were successful and affirmed the district court's finding that unusual circumstances were present in those elections. Pet. App. 55a-57a. If such elections are discounted, there is *no* evidence of black electoral success in Red Clay *in the absence of special circumstances*, which is the test mandated in *Gingles*.[6]

A comparison with the facts in *Gingles* shows the weakness of petitioners' claim. Although black candidates had been elected to office in all of the legislative districts at issue in *Gingles*, 478 U.S. at 74 nn. 35 & 36, this Court rejected the defense of proportional representation in all but one district. In that district, which was 36% black, a black candidate had been elected to one of the three available seats every year for ten years, and plaintiffs failed to offer any evidence of unusual circumstances affecting the success of most of the black candidates. 478 U.S. at 74-77 and n.35. In other districts, where black electoral success, though substantial, did not amount to "persistent proportional representation," the Court rejected the proportional representation defense. *Id.; see also* Pet. App. 53a-54a, 57a.[7]

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[6] It is immaterial that, in discussing some of the black candidates' success, the Court of Appeals mentioned that legally significant white bloc voting could be found even if the black candidates' success were *not* due to special circumstances. Pet. App. 53a. Since the district court *did* find unusual circumstances in two elections, the point is academic and presents nothing for this Court to review.

[7] For example, in House District 21, a black candidate had been elected to the six-member delegation in the previous two elections, while in House District 39, a black candidate had twice been elected to the five-member delegation before the lawsuit was filed and two

Further, because the Court of Appeals recognized and fully applied the principle that persistent proportional representation may provide a defense in a Section 2 case, there is no conflict between the Court of Appeals' decision and other decisions holding that persistent proportional representation may provide a defense.[8] No decision cited by petitioners holds that a court *may not* take into account the circumstances surrounding a black candidate's success in determining whether black voters have enjoyed persistent proportional representation sufficient to defeat a Section 2 challenge to an at-large election system.[9] Indeed, such a holding would be flatly contrary to *Gingles*.

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more blacks were elected while the litigation was pending. 478 U.S. at 74 & nn. 35 & 36. The Court upheld findings of Section 2 violations in these districts.

[8] In *Valladolid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992), on which petitioners rely (Pet. at 14), the court granted summary judgment against plaintiffs because plaintiffs were unable to identify *any* minority-preferred candidate who had been defeated. The minority-preferred candidates had been successful in *each* of the three elections plaintiffs analyzed. 976 F.2d at 1296-97. Moreover, nothing in the split concurring opinions in *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (*en banc*), *cert. denied*, 498 U.S. 1023 (1991), would require a factual finding in favor of petitioners on their claim of proportional representation, and those concurring opinions do not constitute precedent in any event. The other decisions cited at p. 17 of the petition are cases where black voters attained proportional representation because of the creation of black majority single-member districts that clearly gave black citizens the ability to elect candidates of their choice; those decisions have no bearing on this case. *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2334 (1993); *Seastrunk v. Burns*, 772 F.2d 143 (5th Cir. 1985).

[9] In addition, petitioners' method of calculating "proportional representation" is misleading. According to petitioners, if three of ten black candidates, or 30%, have been elected, and black voters constitute 14% of the population, a defense of proportional representation has been established as a matter of law. Even apart from the need to consider the circumstances of the elections, this

Finally, petitioners erroneously claim that the Third Circuit refused to consider minority electoral success as an aspect of the third *Gingles* factor. Pet. at 18-19. Purporting to quote the Third Circuit, they assert that the Third Circuit described the issue of proportional representation and the issue of *Gingles* factor III as " 'separate contexts.' " Pet. at 18, citing Pet. App. 25a. Petitioners claim that this conflicts with decisions of other courts that "have dealt with minority electoral success as part of their analysis of whether bloc voting 'usually defeats' minority-preferred candidates." Pet. at 18.

Regrettably, all of this is an invention. The alleged quote concerning "separate contexts" appears nowhere on the cited page, and nothing on that page or anywhere else supports defendants' mischaracterization of the Court's opinion. In fact, the Court of Appeals' discussion on that page states the *opposite* of what petitioners claim. The footnote on that page takes issue with the district court for failing to address special circumstances explaining minority electoral success in its discussion of *Gingles* factor III, even though the district court noted

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approach is illogical. The ratio between the number of black candidates who run and the number who win bears no necessary relationship to whether minority representation has been proportional to minority population. *Gingles* did not employ such an analysis; rather than examining the "success rate" of minority candidates, *Gingles* focused on the racial composition over time of the legislative delegations in each district and the degree of black electoral success in each district in each election, using elections as the base of analysis (not the number of candidates). Thus, where minority representatives constituted one-third of the delegation of House District 23 in each of 6 elections, persistent proportional representation barred the Section 2 claim. 478 U.S. at 75, 77. Here, by contrast, although one black candidate sat on the seven-member school board from 1981 to 1985, the school board was all white from 1985 through 1990. This may be compared to House District 21 in *Gingles*, where the defense of proportional representation was rejected although two of the three black candidacies in the elections studied by the court were successful—a "success rate" of 67% under petitioners' theory. *Id.* at 74-76, 81.

those circumstances in its analysis of the proportional representation defense. Pet. App. 25a. As the Court of Appeals expressly states, "consideration of special circumstances is specifically mandated within the definition of the third *Gingles* factor." Pet. App. 25a. This ruling is fully in accord with *Gingles* as well as with the rulings petitioners cite as being in "conflict" with the Third Circuit's decision (*see* Pet. at 18-19).

**B. Petitioners' Failure of Proof with Respect to their Claim of "Non-racial Voter Motivation" Does Not Warrant This Court's Review.**

As with petitioners' "proportional representation" claim, the factual predicate for petitioners' second alleged conflict is simply missing and is based upon misrepresentations of the record and the lower courts' decisions. According to petitioners, the Third Circuit erred by "rejecting unrefuted evidence of a non-racial voter motivation for the election results at issue." Pet. at 19. Far from being "unrefuted" (petitioners also characterize this evidence as "uncontested," *id.* at 21, 24, and "uncontradicted," *id.* at 20), petitioners' effort to provide a non-racial explanation for the racially polarized voting patterns in Red Clay was specifically rebutted by respondents at trial.[10] *See, e.g.*, Pet. App. 87a-88a, 90a; *see also* Reply Brief of Plaintiffs-Appellants at 13-14. The *district court* did not rule that petitioners had successfully demonstrated a non-racial explanation for the defeat of black candidates supported by black voters, and thus it is hardly surprising or significant that the Court of Appeals did not adopt petitioners' view of the facts either.

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[10] Petitioners are certainly aware of the falsity of their assertion that the "feeder pattern" evidence was uncontested, since Respondents drew it to their attention in their Reply Brief in the Third Circuit, specifically canvassing the evidence refuting petitioners' claim. Reply Brief for Plaintiffs-Appellants at 13-14.

Indeed, petitioners' evidence on this point was extraordinarily weak. Petitioners' theory was that voters in the Red Clay District chose candidates based on whether they favored mandatory changes in "feeder patterns" (*i.e.*, assignments of neighborhoods to specific schools) to achieve racial balance, or whether they favored instead so-called "choice" or magnet school plans that would not require mandatory changes in "feeder patterns." However, there were *seven* election contests between black and white candidates on which evidence was presented at trial, and petitioners contended that this "feeder pattern" issue affected *only two* of those elections—the 1985 and 1988 elections. Moreover, in both of those elections the evidence strongly refuted petitioners' asserted "non-racial" explanation for the defeat of the black candidates. In 1985, the white candidate and the black candidate *both* favored *magnet school plans*;[11] nevertheless, black voters preferred the black candidate and white voters did not, with the result that the black candidate lost despite running as an incumbent. Pet. App. 8a, 28a. Similarly, in the 1988 election, plaintiffs' regression analysis and expert testimony established that the black vote went to the black candidate while the two white candidates received almost all of the white vote (Pet. App. 44a, 84a, 90a, 92a), even though—according to the defendants—the black candidate took the same position on the "feeder

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[11] The candidates' positions on the issue were reported in the principal Wilmington area newspaper prior to the election, which also stated after the election: "Because Roberts is black and Eckman is white, race became an issue in the election." In addition, both candidates specifically testified that they supported magnet school plans when they ran for the school board in 1985. The evidence on this issue is set forth in the Joint Appendix submitted to the Third Circuit. *See* Jt. App. 1 at 110-11 (testimony of black candidate Roberts); Jt. App. 3 at 1085 (deposition testimony of white candidate Eckman); Jt. App. 4 at 1406-1408 (newspaper articles on 1985 campaign).

pattern" issue as one of the two white candidates.[12] On this record, petitioners cannot support a claim that the lower courts erred in declining to adopt petitioners' version of the facts, and in any event such a claim does not warrant exercise of this Court's certiorari jurisdiction.

The petitioners erroneously declare that "[t]he Third Circuit specifically embraced the view of the Tenth Circuit in *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990), that voter motivation is irrelevant in determining whether white bloc voting is 'legally significant,' thereby adopting the view of Justice Brennan's plurality opinion in *Gingles*, 478 U.S. at 63." Pet. at 19-20. This is a misrepresentation of the Third Circuit's decision. The "pertinent portion of *Sanchez*" which petitioners claim was "adopted by the Third Circuit", Pet. at 21, is alleged to be the passage at 875 F.2d 1493, which discusses whether racial bloc voting may be explained away with reference to underlying differences in the minority and majority population. The Third Circuit, however, did not cite or discuss that portion of *Sanchez v. Bond*.[13] The Third Circuit did describe a *different* portion of *Sanchez*—the *Sanchez* court's view of the relevance of elections in which no minority candidates competed. 875 F.2d at 1494-95, 1496; Pet. App. 40a-41a. That is a separate issue,[14] and petitioners'

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[12] *See* Joint Appendix submitted to Third Circuit, Jt. App. 3 at 927-32 (rebuttal testimony of plaintiffs' expert witness); Jt. App. 4 at 1512 (plaintiffs' rebuttal exhibit).

[13] Furthermore, petitioners are also mistaken in discussing the Third Circuit's citation of *Gingles*. Citing the Court of Appeals' opinion at Pet. App. 58a, petitioners state that the Third Circuit adopted Justice Brennan's views stated at 478 U.S. at 63. However, at Pet. App. 58a, the Court of Appeals does not mention that portion of *Gingles*; instead, it relies upon the *Gingles* majority opinion, 478 U.S. at 47-48.

[14] As an apparent afterthought, the petitioners suggest in a footnote that the Court could grant review to determine this "subsidiary" quesion—that is, the question of how to determine the

incorrect description of the Third Circuit's discussion of *Sanchez* presents nothing warranting review by this Court.

In any event, the Third Circuit had no occasion to consider whether proof of a "non-racial" motivation for racially polarized voting patterns bars a Section 2 claim, given petitioners' failure of proof on this issue. Accordingly, there was no occasion for the Third Circuit to "adopt" the position of *Sanchez v. Bond* on this issue, nor can its decision be said to "conflict" with the Fifth Circuit's decision in *League of United Latin American Citizens v. Clements* ["*LULAC*"], 999 F.2d 831 (5th Cir. 1993), *petition for cert. filed*, No. 93-630 (October 21, 1993).

The Third Circuit's actual discussion of white voter behavior occurred in a context different from that alleged by petitioners, and constitutes a wholly correct statement of the law with which no circuit is in conflict and which is not challenged in the petition for certiorari. In its discussion, the Court of Appeals correctly rejected the contention of defendants below, and the district court's ruling, that white bloc voting cannot by legally significant if the percentages of whites voting for white candidates and against black candidates is not consistent in every election. In this context, the Court of Appeals observed that "*Gingles* does not require a showing that white voters vote as an unbending monolithic block against whomever happens to be the minority's preferred candidate." Pet. App. at 34a. *See Gingles*, 478 U.S. at 56 (defining legally

"minority-preferred" candidate in elections that involve no minority candidates. Pet. at 21 n.6. Petitioners, however, do not claim that the Third Circuit erred in addressing this question. Moreover, this question merely raises the highly fact-intensive and case-specific issue of which elections should be considered probative in determining the existence of racially polarized voting. The various Court of Appeals' decisions cited by petitioners do not involve a true conflict on a controlling issue of law, but rather differing determinations on the merits of particular disputes based on differing sets of facts. *See* cases cited at Pet. at 21 n.6.

significant white bloc voting as a "white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes.").[15]

Clearly, in holding that white bloc voting need not occur at the same lockstep percentage in each election, the Third Circuit was addressing a far different issue than that presented in the Fifth Circuit's *LULAC* decision, on which petitioners rely. In *LULAC*, the Fifth Circuit found that partisan voting patterns, not racial voting patterns, explained the defeat of black and Hispanic candidates.[16] *See, e.g.*, 999 F.2d at 877-79. There is nothing inconsistent between that holding and the Third Circuit's ruling that a showing under *Gingles* factor III does not require an identical level of white bloc voting in each election. *See* Pet. App. at 34a-35a. Furthermore, the alleged conflict with the Fifth Circuit's *LULAC* decision is also illusory given that the Third Circuit expressly noted that it was not reaching the issue which divided the majority and the dissent in the panel decision in *LULAC*. Pet. App. 37a.[17]

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[15] The district court noted that plaintiffs' figures showed a maximum possible white vote for black candidates that "ranged from a low of 9 percent to a high of 53 percent" and ruled that "these varied results do not indicate a consistent pattern of whites voting against the black candidate." Pet. App. 97a. However, in *Gingles* white support for black candidates ranged from 8 percent to 50 percent in the primary elections and 28 percent to 46 percent in the general elections in the districts where this Court affirmed the findings of a Section 2 violation. 478 U.S. at 80-82.

[16] As noted above, the facts in this case did not support a similar "non-racial" explanation for the defeat of black candidates.

[17] As the Third Circuit stated: "We do not reach the related, but potentially more difficult question of what evidentiary weight, if any, should be given the election of minority candidates who are not the minority voters' candidate of choice. This issue produced a sharp split between the majority and the dissent in a recent opinion by the Fifth Circuit. *See League of United Latin American Citizens, Council No. 4434 v. Clements*, [986 F.2d 728 (5th

Petitioners next complain that "the Third Circuit held that the only inquiry in evaluating 'white bloc voting' is whether the 'candidate is truly the minority community's representative of choice.'" Pet. at 21, citing Pet. App. 40a, 41a. This is untrue. The phrase "white bloc voting" does not even *appear* at Pet. App. 40a-41a, and the remainder of the quotation has been wrenched violently out of context.[18] Indeed, the Third Circuit was discussing minority voting behavior, not white voting behavior, in that portion of its opinion.

Finally, petitioners contend that review should be granted because the Third Circuit's opinion prevents consideration of evidence other than the three *Gingles* factors in Section 2 cases. This is also untrue. The Third Circuit did acknowledge that proof of the *Gingles* factors is highly important. However, it also stated:

> The *Gingles* factors, however, are merely threshold considerations . . . . Therefore, even after a court has determined that the plaintiffs proved each of the *Gingles* factors, it must go on to consider whether the totality of circumstances, evaluated under "a

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Cir. 1993)] (addressing, among other issues, the effect of the election of black Republican judges to the vote dilution analysis), *reh'g en banc ordered on motion of the court*, 984 F.2d 634 (Feb. 11, 1993)." Pet. App. 37a n.10. This issue also divided the majority from the dissent in the Fifth Circuit's subsequent *en banc* decision. 999 F.2d 831.

[18] The sentence containing the phrase quoted by petitioners actually states:

> While the court in *Sanchez* provided some guidance for determining which candidates may be considered minority-preferred, we believe it is important to embellish slightly on its standard, as described below, to emphasize two points: (1) that not all minority candidates will be minority-preferred; and (2) that it is important to look beyond whether a white candidate received a majority of the minority community's vote and determine whether that white candidate is truly the minority community's representative of choice.

Pet. App. 41a.

> searching practical evaluation of the 'past and present reality' " and a "functional view of 'political process,' " establishes that the particular voting scheme diminishes the minority group's opportunity fully to participate in the political process.

Pet. App. at 16a (citations omitted). Having reversed the district court for error in applying *Gingles* factor III, the Third Circuit declined to assume that the district court's evaluation of the totality of circumstances would be unaffected by the correction of this error, and therefore remanded the case. Pet. App. 63a. The Third Circuit's remand for such further consideration was appropriate and presents nothing warranting this Court's review.[19]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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December 20, 1993

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[19] As noted earlier, because the Third Circuit's decision is interlocutory and a remand is necessary, there is no reason to "hold" this case pending the outcome of *Johnson v. DeGrandy*, No. 92-519 (consolidated with *DeGrandy v. Johnson*, No. 92-593, and *United States v. Florida*, No. 92-767), *Holder v. Hall*, No. 91-2012, or *LULAC*. In any event, those cases raise entirely different questions, and no decision in those cases can remedy the factual deficiencies that undermine the petitioners' allegations here. In the unlikely event that the outcome here would be affected by pending cases, the lower courts can certainly apply any new decisions in the course of the further proceedings to be conducted on remand.